

(28,327)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 372.

BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

v.s.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Original. Print.

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1

I. Petition. Filed November 30, 1920.

In the Court of Claims of the United States.

No. 34744.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

Petition.

(Filed November 30, 1920.)

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully shows unto your honors the following facts:

1. Petitioner is a corporation organized under the laws of the State of Maryland and operates, and at the time hereinafter stated did operate, a system of railroads in interstate commerce in the United States. That on September 22, 1919, petitioner filed a claim for refund of stamp taxes erroneously or illegally collected from it by the United States, upon the proper form of the Bureau of
2 Internal Revenue, in the sum of \$55,158.00, and based its claim for refund upon the ruling of the Acting Commissioner of Internal Revenue, dated April 18, 1919, in a letter he wrote to the Corporation Trust Company of New York, New York, in which he stated:

"You are advised that the deeds of conveyance in question are not subject to stamp tax under subdivision 7, Schedule A, act of 1918, provided that no valuable consideration passed from the grantee to the grantor."

In said claim for refund your petitioner set forth a certain list of deeds, thirteen in number, given October 1, 1915, by its subsidiary companies to your petitioner, with the amount of stamps attached, and which were canceled October 29, 1915. Said deeds were given without any valuable consideration passing from the grantee companies to the grantor company, your petitioner, and said deeds of conveyance were prepared for a nominal consideration for the purpose of mortgaging its entire property to meet urgent operative needs. Following is a list of the deeds, with the name of each, the date of each, and the amount of revenue stamps affixed to each one:

Name.	Date of deed.	Amt. revenue stamps.
Akron & Chicago Jnc. R. R. Co.....	Oct. 1, 1915	\$6,529.00
Central Ohio R. R. Co.....	do.	7,190.00
Cleveland, Lorain & Wheel. R. R. Co.....	do.	13,997.00
Cleve. Terminal & Valley R. R. Co.....	do.	5,238.00
Cleve., Wooster & Mus. Vly. R. R. Co.....	do.	231.50
Col's & Cinit. Midland R. R. Co.....	do.	3,491.00
Eastern Ohio R. R. Co.....	do.	208.50
Mahoning Valley Western R. R. Co.....	do.	4,349.50
Ohio Midland R. R. Co.....	do.	979.00
Pittsburgh, Cleveland & Toledo.....	do.	3,599.50
Pitts., Painesville & Fpt. Ry. Co.....	do.	1,584.50
San., Mans. & Newark R. R. Co.....	do.	4,866.00
Trumbull & Mahoning R. R. Co.....	do.	2,894.50
		\$55,158.00

3 The original deeds as listed above, with canceled stamps affixed thereto, were attached to your petitioner's said claim for refund and thereby became a part of said claim for refund and were duly filed with the Commissioner of Internal Revenue.

2. Under date of October 2, 1919, the Commissioner of Internal Revenue wrote a letter to your petitioner rejecting its said claim for refund of stamp taxes erroneously or illegally paid and giving the reason that the stamps in question, having been purchased in 1915, are barred from redemption by the two years' limitation imposed by the act of May 12, 1900 (31 Statute, 177).

3. On December 22, 1919, your petitioner wrote a letter to the Commissioner of Internal Revenue asking for a hearing before him and vigorously dissenting from his action rejecting its claim for refund of stamp taxes and stating that the two years' limitation provision of the act of May 12, 1900 (31 Statute, 177), has no application whatsoever to the said claim for refund of stamp taxes.

4. Upon hearing held before the Solicitor of Internal Revenue, and also personally before the Commissioner of Internal Revenue, your petitioner called to the attention of each of the said officers its informal claim in abatement filed by it under date of February 11, 1915, in the Bureau of Internal Revenue, in which it specifically set forth in detail three of the deeds of conveyance listed in its claim for refund as follows:

Mahoning Valley Western R. R. Co.
Akron & Chicago Junction R. R. Co.
Central Ohio R. R. Co.

Each of said tendered deeds contained only a nominal consideration and conveyed property of each of the subsidiary corporations to the

parent corporation. Said informal claim in abatement stated
4 that no stamp tax should apply to these tendered deeds and asked for a ruling of the Commissioner of Internal Revenue.

The Commissioner of Internal Revenue, by letter to your petitioner under date of February 25, 1915, rejected the informal claim in abatement and held that the stamp tax applied. Under said rejection by the Commissioner of Internal Revenue your petitioner had no other alternative but to pay the stamp taxes on the three deeds and ten other deeds which conveyed property from certain subsidiary companies to the parent corporation for a nominal consideration, which it did, as shown by the original deeds filed with its claim for refund.

5. Your petitioner contended before the Commissioner of Internal Revenue, and now contends, that its informal claim in abatement has been properly amended and perfected and duly presented under the internal-revenue laws and the regulations of the Bureau of Internal Revenue providing for the refunding of stamp taxes illegally or erroneously paid to the United States, and is therefore entitled to the full amount of its said claim for refund of \$55,158.00 by reason of the said ruling of the Acting Commissioner of Internal Revenue of April 19, 1919, as hereinbefore set forth. The provisions of the Internal Revenue Act of October 22, 1914 (38 Statute, 745), relating to deeds of conveyance is identical with the provisions of the internal-revenue statute of February 24, 1919 (40 Statute, 1057), relating to deeds of conveyance, and the ruling of the Acting Commissioner of Internal Revenue of April 18, 1919, relating to deeds of conveyance from subsidiary to parent corporation- for a nominal consideration applies with equal force to the Internal Revenue Act of October 22, 1914 (38 Statute, 745), relating to deeds of conveyance.

6. That no action upon your petitioner's foregoing claim has been had before Congress. That said claim was presented to the Commissioner of Internal Revenue, Treasury Department, and that the total amount of said claim, \$55,158.00, was disallowed by the Commissioner of Internal Revenue, and your petitioner protested the disallowance of the said amount to the Commissioner of Internal Revenue in writing on December 22, 1919, and March 12, 1920, but to no avail, and said Commissioner of Internal Revenue adheres to his said action of rejection. That no transfer or assignment of said claim or any part thereof or interest therein has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and set-offs; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore, your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for the payment by the United States to your claimant of the said sum of fifty-five thousand one hundred and fifty-eight dollars (\$55,158.00).

2. That your claimant may have such other and further relief as the nature of the case may require and to the court may seem meet and proper.

BALTIMORE AND OHIO RAILROAD
COMPANY,
By W. D. OWENS,
Assistant Comptroller.

JOHN F. McCARRON,
Attorney of Record.
GEORGE E. HAMILTON,
Of Counsel.

6 STATE OF MARYLAND, *To wit:*

W. D. Owens, being duly sworn, says he is assistant comptroller for the Baltimore & Ohio Railroad Company; that he has authority to subscribe to and verify the foregoing petition from said company; that he has read said petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

W. D. OWENS.

Subscribed and sworn to before me this 19th day of November, A. D. 1920.

GEORGE W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

STATE OF MARYLAND,
City of Baltimore, To wit:

G. F. May, being first duly sworn, says he is assistant secretary of the Baltimore & Ohio Railroad Company; that W. D. Owens, assistant comptroller, who has subscribed to and verified the petition of said company annexed hereto, is authorized to do so.

G. F. MAY,
Assistant Secretary.

Subscribed and sworn to before me this 19th day of November, A. D. 1920.

GEORGE W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

7 II. *History of Proceedings.*

On January 24, 1921, the defendant filed a motion to require plaintiff to make its petition more definite and certain.

On February 8, 1921, the Court overruled said motion but without prejudice to any question that may be presented on demurrer or otherwise.

III. Defendant's Demurrer. Filed April 4, 1921.

The United States, by its Attorney General, demurs to the petition filed herein, for the following reasons—

1. The petition does not state facts sufficient to constitute a cause of action;
2. The petition does not state a cause of action within the jurisdiction of this Court.

ANNETTE ABBOTT ADAMS,
Assistant Attorney General.

FRED K. DYAR,
Special Assistant to the Attorney General.
WM. D. HARRIS,
Attorney.

IV. Argument and Submission of Demurrer.

On April 11, 1921, the demurrer was argued and submitted by Fred K. Dyar, Esq., for defendant, and John F. McCarron, Esq., for plaintiff.

8 V. Opinion of the Court by Booth, J. Filed May 16, 1921.

BOOTH, Judge, delivered the opinion of the court:

This is a demurrer to plaintiff's petition. The petition of the plaintiff railroad company alleges a cause of action predicated upon the refusal of the Commissioner of Internal Revenue to refund the claimed sum of \$55,158 illegally exacted as stamp taxes upon certain deeds of conveyance to it executed and delivered in 1915. On October 1, 1915, thirteen railroad companies executed and delivered to the plaintiff company deeds conveying the property of these companies to the plaintiff. The plaintiff company having some doubt as to the application of the stamp act of October 22, 1914 (38 Stat., 745), to the transaction applied to the Commissioner of Internal Revenue for a ruling thereon, at the time exhibiting three only of said deeds. The commissioner held adversely to this contention, and acquiescing therein the plaintiff company without protest affixed to each of said deeds the requisite amount of stamps, totaling the sum now sued for. Four years thereafter the commissioner in construing the act of 1918 held "that where no valuable consideration passed, stamps were not required on conveyances."

The plaintiff's transaction of 1915 being similar in all respects to the above ruling of the commissioner it immediately provoked a renewed, and what the plaintiff now claims an amended, effort to avail itself of the final ruling of the commissioner and collect the stamp taxes paid by it in 1915. To this end, therefore, on September 22, 1919, it filed with the commissioner its claim for a refund of said taxes, which was rejected because of the intervention of the statute of limitations. A hearing was granted the plaintiff, and the same contentions now advanced were likewise advanced before the com-

missioner. The argument now constructed rests upon a strenuous insistence that the claim for a refund filed in 1919 is no more nor less than an amendment of its so-called informal claim for an abatement filed in 1915, thus perfecting the former and for the first time claiming a refund of the taxes, thereby escaping the statute of limitations and enabling the plaintiff to maintain the present suit upon the rejection of its so-called perfected claim by the commissioner. In other words, the alleged informal claim for abatement of the taxes by this belated process is converted into a primary claim for a refund of the same notwithstanding the long repose of the former, and which is admittedly without vitality unless it can be thus revived.

9 Designating a paper "an informal claim for abatement" in a suit to recover a refund of taxes paid is not good pleading. It is the conclusion of the pleader. Fortunately in this case sufficient positive facts are alleged which disclose the transaction in detail. The facts alleged bear absolutely no similarity to either a claim for abatement or refund of the taxes now alleged to be illegal. On the contrary, prior to affixing the stamps to the deeds in issue the plaintiff company exhibited to the commissioner three specific copies of the deeds, each containing only a nominal consideration, stating that in its opinion no stamp tax should apply to said deeds, and asking for a ruling of the commissioner with respect thereto. The commissioner promptly complied with the request, and the plaintiff instead of asking for an abatement of the same thereafter purchased the stamps, affixed them to the deeds, canceled the same, and accepted the ruling of the commissioner, never seeking in any manner to challenge its conclusiveness until some four years later it discovered in the decision of a case in which it was in nowise concerned there existed a possibility to proceed now as it should have proceeded four years ago. The widest latitude has been allowed the vigilant in the matter of amendment of claims for refund of illegal taxes, but no authority has been cited wherein the courts have gone to the extreme, no matter how apparent the equities of the situation, in sustaining a claim after a long repose and which would doubtless have continued in such a state save for the persistence and vigilance of a later and another claimant, the ruling in whose case affords prospects of recovery for an abandoned claim.

We think the commissioner was right when he rejected the claim. Revised Statutes, section 3226, provides as follows:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard * * * and a decision of the commissioner has been had therein: Provided, That if such decision is delayed more than six months from the date of such appeal then the said suit may be brought * * *."

The act of May 12, 1900 (31 Stat., 177), as amended by the act of June 30, 1902 (32 Stat., 506), provides, in part, as follows:

"That the Commissioner of Internal Revenue, subject to regula-

tions prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal-revenue tax, as may have been spoiled * * * or in any manner wrongfully collected * * *: Provided further, That no claim for the redemption of or allowance for stamps shall be allowed unless presented within two years after the purchase of said stamps from the Government."

Rock Island, Arkansas & Louisiana Ry. Co. v. United States, decided by the Supreme Court November 22, 1920, 254 U. S., 141.

The demurrer is sustained and petition dismissed. It is so ordered.

Graham, Judge; Hay, Judge; and Downey, Judge, concur.

Campbell, Chief Justice, took no part in the decision of this case.

10

VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 16th day of May, A. D., 1921, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By THE COURT.

VII. *Plaintiff's Application for and Allowance of an Appeal.*

Now comes the Baltimore and Ohio Railroad Company by its attorneys, George E. Hamilton, of Counsel, and John F. McCarron, Attorney of Record, and appeals to the Supreme Court of the United States from the decision of this honorable court rendered in this cause in favor of the United States on May 16, 1921.

Very respectfully,

GEORGE E. HAMILTON,
Of Counsel.

JOHN F. McCARRON,
Attorney of Record.

Filed June 20, 1921.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL,
Chief Justice.

June 21, 1921.

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Court of Claims.

No. 34744.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of demurrer; of the opinion of the Court by Booth, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this Twenty-second day of June, A. D., 1921.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28327. Court of Claims. Term No. 372. Baltimore & Ohio Railroad Company, appellant, vs. The United States. Filed June 24th, 1921. File No. 28327.

(4424)